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discharge the burden which the law imposes on the accused. As the learned Government Advocate has urged in his argument, it is a dangerous thing to manufacture imitations of current coins, and this is no doubt the reason for the stringency of the law as contained in Explanation 2 of section 28 of the Indian Penal Code. We are therefore of opinion that the appeal must be allowed. The learned Government Advocate, however, does not press for a heavy sentence and explains that the object of the appeal is to obtain a pronouncement by this Court as to whether the law laid down by the Court below was correct. Having regard to this and to the circumstances of the case we impose a light sentence. We allow the appeal, set aside the order of acquittal, and convicting Qadir Bakhsh, Algu and Karim Bakhsh under section 231, Indian Penal Code, direct that the District Magistrate do send for the three accused and detain them in his Court until the rising of the Court. We further order that, the accused Qadir Bakhsh do pay a fine of Rs. 10 or in default undergo one month's rigorous imprisonment.

APPELLATE CIVIL.

1907
November 20

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

AMBIKA PARTAP SINGH (DEFENDANT) *v.* DWARKA PRASAD AND OTHERS (PLAINTIFFS) AND DALEL KUNWAR AND OTHERS (DEFENDANTS).*

Hindu law—Hindu widow—Mortgage of husband's estate adversely to adoptive son—Suit to enforce mortgage against adoptive son—Act No. IV of 1882 *(Transfer of Property Act), section* 52*—Lis pendens—Contentious suit—Application for leave to sue in formâ pauperis—Civil Procedure Code, section* 410.

A mortgage of part of her late husband's estate was executed by a Hindu widow in defiance of the rights of her husband's adopted son, and in fact in collusion with the mortgagee and in order to deprive the adopted son of his adoptive father's estate. Shortly before this mortgage was executed by the widow the adopted son had applied for leave to sue *in formâ pauperis* for the recovery of his adoptive father's estate. *Held*, on suit by the mortgagees to enforce their mortgage against the adopted son, then in possession, that the suit must fail, both because the fact of the estate having to some slight extent benefited by the money borrowed was not sufficient under the

* First Appeal No. 160 of 1905 from a decree of Aziz-ur-Rahman, Subordinate Judge of Mainpuri, dated the 23rd of March 1905.

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circumstances to make the mortgage enforceable against the adopted son—*Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) distinguished—and also because of the application of the doctrine of *lis pendens*. *Faiyaz Husain Khan* v. *Prag Narain* (2) referred to.

THIS was a suit brought by Dwarka Prasad and others as mortgagees to enforce payment of the amount alleged to be due on a mortgage of the 17th of January 1894. By this mortgage Musammat Dalel Kunwar, the widow of one Chaudhri Gandharp Singh, alleging herself to be the owner in possession, hypothecated a ten biswas share in four villages to secure a principal sum of Rs. 7,000 in favour of one Shukul Ganga Prasad, deceased, the father of the four plaintiffs. The mortgaged property formed part of the estate of Chaudhri Gandharp Singh, who died on the 23rd of December 1891, leaving the defendant Ambika Partap Singh, his adopted son and heir, and also his widow Musammat Dalel Kunwar him surviving. A claim to this estate was set up on behalf of Bindraban *alias* Ambika Partap Singh, the grandson of the mortgagee and son of the plaintiff Shukul Dwarka Prasad. He was put forward as being the adopted son of Gandharp Singh, and was strongly supported in this claim by Dalel Kunwar. Thereupon the defendant Ambika Partap Singh instituted a suit *in formâ pauperis* in the Court of the Subordinate Judge of Mainpuri for recovery of possession of the estate of Gandharp Singh, and his claim was decreed on the 21st of March 1896. An appeal to the High Court was preferred, but the decree of the Court below was upheld on the 12th of May 1899 and on the 12th of August following he obtained possession of the estate. It was during the pendency of this suit that Musammat Dalel Kunwar, who supported the false claim of the grandson of Ganga Prasad, the mortgagee, mortgaged the property in favour of Ganga Prasad as the head of the family of the plaintiffs. In the mortgage deed the money is stated to have been borrowed to pay up a decree obtained by parties of the name of Chunni Lal and Munni Lal against Gandharp Singh, and other debts due by Gandharp Singh, and Dalel Kunwar, the mortgagor, and also alleged irrigation charges.

The Court of first instance (Subordinate Judge of Mainpuri) found that Dalel Kunwar acted in collusion with, and was helped

(1) (1856) 6 Moo., I. A., 393. (2) (1907) I. L. R., 29 All., 339.

by, the plaintiff Dwarka Prasad and that she tried her utmost to deprive the defendant Ambika Partap Singh of Gandharp Singh's estate; that Dwarka Prasad was trying his very best to secure the whole estate for his own son, setting him up as the real Ambika Partap and also setting up a verbal will by Gandharp Singh in his favour. In his judgment he says:—"The widow and Dwarka Prasad knew very well that the defendant (Ambika Partap) had a strong case. They had no hope of success. They therefore tried their best to get hold of some portion of the property, and in order to do so they got up the bond in suit." He then states that "they knew very well that the question of legal necessity would arise" and had one item, namely, the decree of Chunni Lal to support a case of legal necessity. As regards the other items he found that they were fictitious and false. But he found that Dalel Kunwar was competent to mortgage the property for the benefit of the minor owner for the sake of saving any portion of it, and that the mortgage to the extent of the amount of the decree of Chunni Lal and Munni Lal was binding upon the defendant Ambika Partap.

The defendant Ambika Partap Singh appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Dr. *Satish Chandra Banerji* and Babu *Surendra Nath Sen*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Munshi *Govind Prasad*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal is connected with F. A. No. 154 of 1905, and arises out of a suit brought by the plaintiff to enforce payment of the amount alleged to be due on a mortgage of the 17th of January 1894. By this mortgage Musammat Dalel Kunwar, the widow of one Chaudhri Gandharp Singh, alleging herself to be the owner in possession, hypothecated a ten biswas share in four villages to secure a principal sum of Rs. 7,000 in favour of one Shukul Ganga Prasad deceased, the father of the four plaintiffs. The amount claimed in the plaint is no less a sum than Rs. 38,917, the interest claimed being Rs. 32,556-1-1. The mortgaged property formed part of the estate of Chaudhri Gandharp Singh, who died on the 23rd of December 1891, leaving the defendant Ambika Partap Singh,

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his adopted son and heir, and also his widow Musammat Dalel Kunwar him surviving. A claim to this estate was set up on behalf of Bindrabah *alias* Ambika Partap Singh, the grandson of the mortgagee, and son of the plaintiff Shukul Dwarka Prasad. He was put forward as being the adopted son of Gandharp Singh, and was strongly supported in this claim by Dalel Kunwar. Thereupon the defendant Ambika Partap Singh instituted a suit *in formâ pauperis* in the Court of the Subordinate Judge of Mainpuri for recovery of possession of the estate of Gandharp Singh, and his claim was decreed on the 21st of March 1896. An appeal to the High Court was preferred, but the decree of the Court below was upheld on the 12th of May 1899 and on the 12th of August following he obtained possession of the estate. It was during the pendency of this suit that Musammat Dalel Kunwar, who supported the false claim of the grandson of Ganga Prasad the mortgagee, mortgaged the property in favour of Ganga Prasad, as the head of the family of the plaintiffs. In the mortgage-deed the money is stated to have been borrowed to pay up a decree obtained by parties of the name of Chunni Lal and Munni Lal against Gandharp Singh, and other debts due by Gandharp Singh and Dalel Kunwar, the mortgagor, and also alleged irrigation charges.

The learned Subordinate Judge found that Dalel Kunwar acted in collusion with, and was helped by, the plaintiff Dwarka Prasad and that she tried her utmost to deprive the defendant Ambika Partap Singh of Gandharp Singh's estate; that Dwarka Prasad was trying his very best to secure the whole estate for his own son, setting him up as the real Ambika Partap and also setting up a verbal will by Gandharp Singh in his favour. In his judgment he says :— "The widow and Dwarka Prasad knew very well that the defendant (Ambika Partap) had a strong case. They had no hope of success. They therefore tried their best to get hold of some portion of the property, and in order to do so they got up the bond in suit." He then states that "they knew very well that the question of legal necessity would arise" and had one item, namely, the decree of Chunni Lal to support a case of legal necessity. As regards the other items he found that they were fictitious and false. But he found that Dalel

Kunwar was competent to mortgage the property for the benefit of the minor owner for the sake of saving any portion of it, and that the mortgage to the extent of the amount of the decree of Chunni Lal and Munni Lal was binding upon the defendant Ambika Partap.

This ruling is now challenged on the ground that under no rule of law or equity is Ambika Partap bound to pay any portion of a mortgage executed by a party who could in no way be said to have acted for him, but, on the contrary, resisted his claim in collusion with, and helped by, the plaintiff Dwarka Prasad. This Dwarka Prasad was the chief actor in the transaction, as he himself admits. In his evidence he deposed that the mortgage was executed under his supervision and that he was instrumental in obtaining it.

That Dalel Kunwar resisted the claim of the plaintiff and espoused the cause of the false claimant Bindraban is admitted; that she in no way in the transaction acted or purported to act on behalf of the defendant Ambika Partap Singh, also is not and could not be denied. She repudiated his claim throughout. The question then is whether, despite the adverse attitude of the mortgagor against her husband's adopted son, a mortgage executed by her in collusion with the mortgagee, not as guardian of such son, but in her own right, can be enforced against the son to the extent of a debt which was not a charge on the estate, merely on the ground that the estate was benefited by the payment of such debt. In support of an affirmative answer to this question the well-known case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1), in which the powers of a manager for an infant heir to create charges on an estate according to Hindu law are defined, is relied on. In that case the widow of Raja Sheo Buksh Singh, who had died, leaving an only son, an infant, assumed on his death the proprietorship of his estates and the guardianship of the son, and to satisfy debts charged on the estate executed a mortgage describing herself therein as being possessed of the mortgaged property in proprietary right. The son, after he came of age, instituted a suit for the recovery of possession of the mortgaged

(1) (1856) 6 Moo., I. A., 393.

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estate, and to have the mortgage created by his mother set aside. It was held by their Lordships of the Privy Council, reversing the decision of the Sadar Dewani Court at Agra, that the Rani ought to be deemed to have executed the mortgage bond in question as and in the character of guardian of her infant son, and that so far as the estates benefited by the mortgage, it was binding on the owner. Their Lordships also stated that, assuming the bond to have been invalid and ineffectual, the mortgagee would nevertheless be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual. Now in that case it is to be observed that the suit was a suit by the owner to have a mortgage bond set aside and for possession of the estates comprised therein, and not, as in the present case, a suit by the mortgagee to enforce payment of an alleged mortgage debt by sale of the mortgaged property. The suit was not a suit in which an invalid mortgage was sought to be enforced, but a suit in which possession of mortgaged property was sought to be recovered as against a mortgagee. The plaintiff in that case seeking the assistance of a Court of Equity was bound to do equity. The widow in executing the mortgage did not, as in the case before us, set up any adverse title against her son. On the contrary she recognized his rights. In the course of their judgment their Lordships say :—" It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been *pro tanto* a claim adverse to her son ; and it is conceded by the respondents' counsel that she did not claim adversely to her son," and later on, "they consider that the acts of the Rani cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself or others gave to her; that she must be viewed as a manager inaccurately and erroneously described as 'proprietor' or 'heir,' etc." The facts in the case before us are essentially different. In it the holder of an invalid mortgage is not the defendant, but is the plaintiff seeking to recover by sale of the property included in the invalid instrument the amount expressed to be secured by it. Dalel Kunwar did not purport to act as manager or agent for the

appellant Ambika Partap Singh; on the contrary she had espoused the cause of the mortgagee's grandson, who falsely claimed to be adopted son of Gandharp Singh. She executed the mortgage whilst the suit of Ambika Partap Singh for the recovery of the estates was pending, and that too nominally in favour of the grandfather of the claimant, who was supporting the claim of his grandson against the true owner. That the mortgagee knew all the circumstances cannot be doubted. His son, who acted for him and procured the execution of the mortgage, certainly did, and it cannot be said that any of the parties to the transaction acted *bonâ fide* or honestly. We are at a loss to see under such circumstances on what equitable principle the mortgage so executed can be properly enforced. Whether the plaintiff can recover any part of the sum expressed to be secured by the mortgage in an action for debt, or in any other form, is a question we cannot discuss. Suffice it to say that in our judgment they have no right to ask a Court of Equity to enforce by a decree for sale the invalid mortgage, the subject of this litigation, a mortgage which was executed by Dalel Kunwar with the sinister object of depriving the true owner of his property—a mortgage which owed its existence to a dishonest desire on the part of both the mortgagor and the mortgagee to wrest the estates from Ambika Partap. We do not, therefore, think, for the reasons which we have stated, that the ruling in the case of *Hunoomanpersaud Panday* is applicable. The essential difference between this case and that is that in the latter the attacking party was the owner who had benefited by the invalid mortgage and sought to recover possession from the mortgagees without restoring the benefit which he derived from them, while in this case the mortgagee is the attacking party who is seeking to recover money alleged to be due on an invalid mortgage by sale of the property which it purported to mortgage.

But there is another answer to the plaintiff's claim. The mortgage in suit was executed by Dalel Kunwar on the 17th of January 1894; but prior to that date, namely, on the 27th of June 1893, Ambika Partap Singh had made an application to the Court for permission to sue *in formâ pauperis* for recovery of the estate of Gandharp Singh, part of which was the subject of the mortgage,

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Dalel Kunwar and Bindraban being the defendants. Dalel Kunwar resisted this application, and in resisting it acted as guardian for Bindraban. The application was granted on the 12th of May 1894, and the suit was, as we have already said, successfully prosecuted by Ambika Partap Singh as well in the Court of first instance as in the High Court. There was, therefore, at the date of the execution of the mortgage a contentious suit or proceeding pending, in which the right of Ambika Partap Singh to the property which was comprised in the mortgage was directly in question. Section 52 of the Transfer of Property Act prescribes that during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court. No authority was given to Dalel Kunwar to execute the mortgage. Mr. *Sundar Lal*, on behalf of the respondents, contended that the section of the Act in question has no application. His argument was that until the application of the defendant-appellant for leave to sue *in formâ pauperis* had been granted, that is, on the 12th of May 1894, there was no suit pending within the meaning of that section, and he relied upon section 410 of the Code of Civil Procedure, which declares that when an application to sue *in formâ pauperis* is granted and has been numbered and registered, it shall then be deemed the plaint in the suit, and he argued that there was no suit pending at the date of the execution of the mortgage inasmuch as the application for leave to sue had not at that time been numbered and registered. We cannot agree with him in this contention. It appears to us that so soon as the defendant filed his application for leave to sue, there was a contentious suit, or at least a contentious proceeding, pending within the meaning of the section, and it is clear that that suit or proceeding was at the time being actively prosecuted. In this connection we may cite the ruling of their Lordships of the Privy Council in the case of *Faiyaz Husain Khan* v. *Prag Narain* (1) to the effect

(1) (1907) I. L. R., 29 All., 339.

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that where a suit is contentious in its origin and nature, it is not necessary that the summons should have been served in the suit in order to make it "contentious" within the meaning of section 52. Mr. *Chaudhri* relied upon the explanation to section 4 of the Indian Limitation Act as supporting his proposition that the suit is instituted in the case of a pauper when the application for leave to sue as a pauper is filed. This section, no doubt, gives support to his argument, but we think that there is no need to fall back upon it in view of the clear and specific language of section 52 of the Transfer of Property Act.

For the foregoing reasons we are of opinion that the Court below should have dismissed the plaintiff's claim *in toto*. We accordingly allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

1907
November 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

INDAR SEN SINGH (DEFENDANT) *v.* RIKHAI SINGH AND OTHERS (PLAINTIFFS) AND KAMAR-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

Procedure—Relief granted which was not asked for by the plaintiffs—Appeal—Court fee.

The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court fee corresponding to the relief granted to the plaintiffs. The plaintiffs respondents were also required to make good the deficiency in the court fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety. *Held* that the plaintiffs were not entitled to retain the full benefit of the first Court's decree nor liable to pay the additional court fee; and the appellant might on application to the proper authority obtain a refund of the excess court fee which he had been erroneously compelled to pay.

THE plaintiffs in this case sued to enforce a mortgage of the 10th of November 1897. The principal answering defendant Indar Sen Singh was a puisne mortgagee holding a mortgage of the 1st of November 1898, and he also claimed the right to set up as a shield against the claim of the plaintiffs an earlier mortgage of the 17th of September 1897. In the course of the

* First Appeal No. 186 of 1905, from a decree of Syed Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 15th of April 1905.

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suit it was discovered that there existed two prior mortgages affecting the whole or a portion of the mortgaged property, namely, one of the 1st of March 1888 and another of the 23rd of February 1891. The Court of first instance (Subordinate Judge of Jaunpur) found as to the main issue that the defendant Indar Sen Singh was not entitled to set up as a shield the earlier mortgage put forward by him. That Court accordingly granted the plaintiffs a decree for sale of the property covered by the mortgage in suit in default of payment of the mortgage debt. As to the two mortgages of 1888 and 1891, the Court held, notwithstanding that the plaintiffs had claimed no relief in respect thereof, that they were entitled in the present suit to redeem them, and passed a decree to that effect. The defendant Indar Sen Singh appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, Mr. *J. Simeon* and Babu *Mangal Prasad Bhargava*, for the respondents.

The Court (STANLEY, C.J., and BURKITT, J.), after a discussion of the main point in the case arrived at the same conclusion in respect thereof as the Court below had done and accordingly dismissed the appeal. As to the inclusion in the decree below of the two mortgages of the 1st of March 1888 and the 23rd of February 1891, their Lordships' judgment was as follows:—

There is a matter to which our attention has been directed. The suit is a suit to enforce payment of a mortgage of the 10th of November 1897 by sale of the mortgaged property, and for no other relief. In the course of the proceedings, however, it was discovered that there were two prior mortgages affecting the whole or portion of the mortgaged property, namely, a mortgage of the 1st of March 1888, and another of the 23rd of February 1891. No relief was asked in respect of these mortgages, but in the decree of the Court below it was provided that the plaintiffs, on payment of prior mortgages, should be competent to get the property sold by auction, a relief which was not sought. No provision is made in the decree for the sale of the property to satisfy these debts, if paid. The stamp officer of the Court has reported that the court fee paid by the plaintiff in the Court below, in view of the relief given to him, was insufficient, and that the court fee

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paid on the appeal has already been made good, but the deficiency, if any, on the plaint has not been paid. It appears to us that in view of the relief claimed by the plaintiffs in their plaint, the court fees, which have been paid both here and below, are sufficient. Mr. *Sundar Lal*, on behalf of the plaintiffs respondents, expressed his willingness to pay the additional court fee, provided the Court gave his clients the supplemental relief to which the clients would be entitled if the plaint were amended and proper reliefs arising out of the existence of these prior mortgages be granted, but he objects to the payment of any additional court fees unless he gets those additional reliefs. We think his contention is right, and that the decree of the Court below went too far in providing for the redemption of the earlier mortgages, a relief which, we have said before, was not sought. We think that the best course is to modify the decree of the Court below by striking out the portion which deals with the prior mortgages. The directions contained in the decree from the words "if the plaintiffs pay" down to the words "Muhammad Mohsin" should be struck out of the decree. The decree will then be the usual mortgage decree for the sale of the mortgagee's rights in the mortgaged property, without prejudice to the claim of any prior incumbrancers. We direct a decree to be so framed, and we extend the time for payment of the mortgage debt up to the 20th of May 1908. On an application in the proper quarter the appellants may be able to obtain a return of the additional court fees which they have been required to pay.

Decree modified.

1907
December 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BANARSI PRASAD (DEFENDANT) *v.* RAM NARAIN AND OTHERS (PLAINTIFFS).*

Guardian and minor—Guardian ad litem—*Civil Procedure Code, section* 447—*Necessity of formal discharge from the duties of guardian* ad litem—*Suit to set aside a decree.*

Held that no suit will lie to set aside a decree where fraud is neither alleged nor proved and no specific relief is asked for save and except the setting aside of the decree. *Umrao Singh* v. *Hardeo* (1) referred to.

* First Appeal No. 18 of 1907, from a decree of Girraj Kishor Dat, Subordinate Judge of Bareilly, dated the 30th of November 1906.

(1) (1907) I. L. R., 29 All., 418.

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BANARSI PRASAD v. RAM NARAIN.

Held also that where the same person is both certificated guardian and guardian *ad litem* to minor plaintiffs, the fact that one of such plaintiffs has come of age and been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of her duties as guardian *ad litem*: to do this requires a special order under section 447 of the Code of Civil Procedure.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviyā* and Babu *Sital Prasad Ghose*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit to set aside a decree passed by the Subordinate Judge of Bareilly on the 15th of May 1905 in a redemption suit. The former suit was instituted so far back as the 6th of April 1905, and was a suit for redemption of mortgage and for accounts. The plaintiff in that suit was Kunwar Hulas Singh, the father of the present plaintiffs respondents. The suit was decreed and redemption allowed. The matter came before the High Court on second appeal when this Court affirmed the decree for redemption and directed accounts to be taken on the basis of the gross rental and not upon the basis of actual profits. An appeal was preferred to His Majesty in Council and a decree was passed by the Privy Council on the 25th of March 1903. The case is reported in the Indian Law Reports, 25 All., 387. Upon the question as to the principle upon which the account should be taken their Lordships of the Privy Council reversed the decision of this Court, holding that the defendant mortgagee was not responsible for the amount of the gross rental as shown in the jamabandi but only for such sums as were actually received by him or on his behalf, and such further sums, if any, as might have been received by him but for his own neglect or fault. Their Lordships accordingly directed that an account should be taken of the defendant's receipts and payments under the mortgage deed and that the ultimate balance due to or from the defendant should be certified. We should mention that prior to the decision of the appeal in this Court the appellant Kunwar Hulas Singh died. His three minor sons were brought upon the record as his representatives, his widow Musammat

Mulo being their next friend. In addition to being next friend of her minor sons in this litigation Musammat Mulo was also on the 30th of April 1900 appointed by the District Judge as guardian of their persons and property under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, namely on the 20th of July 1903, the High Court transmitted their order to the Court below under section 610 of the Code of Civil Procedure with direction to carry it into execution. In these proceedings a pleader named Lekhraj Singh appeared for the minors filing his *vakalatnama* as pleader for them and for their next friend. He appears to have acted as such up to the 9th of May 1905. On that day, after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, Lekhraj Singh informed the Court on the day fixed for the hearing that he had no instructions and could not proceed with the hearing. The Court intimating that the accounts had been filed and all that remained to be done was to examine them, adjourned the hearing, considered the accounts and passed a decree on the 16th of May 1905. Meanwhile Musammat Mulo had made an application to the Court of the District Judge stating that her son Ram Narain had attained his majority and that she was incapable of attending to the affairs of the minors and praying that she might be discharged from the post of guardian of their persons and property and that Ram Narain might be appointed guardian in her place. This application was granted on the 3rd of February 1904. No intimation however was given to the Subordinate Judge of the fact that Ram Narain had been appointed guardian in the place of Musammat Mulo, and no application was made on behalf of the minors for the substitution of his name as next friend in the suit which was then pending. This being so, Musammat Mulo continued to be the next friend for the purposes of the suit. The decree of the 16th of May 1905 did not satisfy the plaintiffs, and an application was made by Ram Narain on behalf of himself and his brothers for a reinstatement of the case and a rehearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the learned Judge. The Subordinate Judge refused this application for reasons which it is not

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necessary to criticise. No appeal was taken from his order, though it was appealable, and the decree of the 16th of May 1905 has become absolute. The suit out of which the present appeal has arisen was then launched, the sole prayer for specific relief being that the decree of the 16th of May 1905 may be set aside. The learned vakil for the respondents has been unable to refer us to any authority for the bringing of a suit in which the only relief claimed is the setting aside by a Subordinate Judge of a decree passed by his predecessor. It is true that the plaintiff claimed any other relief which might be just; but we do not think that this general prayer would justify the passing of an order which would have the effect of annulling a decree against which no appeal was preferred. Even if fraud on the part of the defendant appellant had been alleged, we do not think that the Court would have any jurisdiction to set aside the decree. If other relief had been prayed for and there were proof of fraud in obtaining the decree, it might be open to the Court to treat the decree as a nullity and to give suitable relief. But in this case fraud is neither alleged nor proved, and no specific relief is asked for, save and except the setting aside of the decree. On this subject we may refer to the ruling of this Court in the case of *Umrao Singh* v. *Hardeo* (1). The learned Subordinate Judge appears to us to have been under a misconception as to the difference between a next friend acting for minor plaintiffs in a suit, and a guardian appointed over the persons and properties of minor under the Guardians and Wards Act. He says in the course of his judgment that "the guardian's name nominally remained as guardian in suit No. 52 of 1895 after the 3rd of February 1904, when Musammat Mulo was removed from guardianship and Ram Narain, the plaintiff, was declared an adult and was appointed guardian of the other plaintiffs by order of the District Judge of Bareilly." He then held that if the plaintiffs had not been properly represented in the proceedings which resulted in the decree, the present suit was maintainable. He evidently considered that when Musammat Mulo was removed from the guardianship under the Guardians and Wards Act she ceased to act as next friend of the minors in the pending suit.

(1) (1907) I. L. R., 29 All., 418.

Such was not the case. Mr. *Moti Lal* has pointed out the course which should have been adopted by the parties if she had desired to retire from the office of next friend in the pending suit. Section 447 of the Code of Civil Procedure directs that a next friend shall not retire at his own request without first procuring a fit person to be put in his place and without giving security for the costs already incurred. This provision of the Code was absolutely ignored by the parties. The Subordinate Judge seems to have considered that the appointment of Ram Narain by the District Judge as guardian under the Guardians and Wards Act was tantamount to his appointment as next friend for his minor brothers in the suit before the Subordinate Judge. We are not able clearly to understand the order which has been passed by him. Whilst setting aside the decree, which is the only relief which was sought, he has given a direction that the suit No. 52 of 1895, that is, the former suit, is to be restored to its original number on the file and that inquiries be made in accordance with the order of their Lordships of the Privy Council. We think that the suit was misconceived and that this appeal must be allowed. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts. We extend the time for payment of the amount due by the plaintiffs up to the 3rd January 1908.

Appeal decreed.

REVISIONAL CRIMINAL.

1907
July 16.

Before Mr. Justice Richards.

RAM DENI *v.* NAND LAL RAI.*

Criminal Procedure Code, section 195—*Sanction to prosecute—Jurisdiction to grant or revoke sanction.*

Application was made under section 195 of the Code of Criminal Procedure to a Magistrate of the third class, who tried the original case, for sanction to prosecute the complainant. This application was refused. A further application was then made to the District Magistrate, who granted sanction. *Held* that the Sessions Judge had no power to set aside the order of the District Magistrate granting sanction.

IN this case one Ram Deni filed a complaint in the Court of a Magistrate of the third class charging two persons, Nand Lal and

* Criminal Revision No. 336 of 1907.